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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1939

No. 798 28

HERTHA J. SIBBACH, *Petitioner,*

vs.

WILSON & COMPANY, INC., *Respondent.*

REPLY TO BRIEF OF RESPONDENT.

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Of Counsel.

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REPLY TO BRIEF OF RESPONDENT.

SUMMARY OF ARGUMENT.

1. Respondent's brief misstates the contention of petitioner.

2. Respondent does not answer numerous arguments made by petitioner.

3. Conclusion.

ARGUMENT.

1. Respondent's Misstatement of Petitioner's Contention.

Respondent's brief indicates that it does not understand the petitioner's argument. Consequently throughout the

respondent's brief the petitioner's contention is misstated and, as misstated, is readily reduced to an absurdity.

Petitioner's Contention.

Petitioner's contention that Rule 35 is invalid is argued in Point II of petitioner's brief (pp. 18-47). It may be summarized as follows:

A. The right not to be compelled to submit to a physical examination may be a "substantive" right forbidden by Congress to be modified by the Federal Rules of Civil Procedure even though in theory the right is not of the character determinative of litigation (Point A, pages 18-29, petitioner's brief).

B. The decisions of this Court in the *Botsford*[1] and *Stetson*[2] cases indicate that the right asserted is "substantive" (Point B, pages 30-39, petitioner's brief).

C. The questions of legislative policy involved in the promulgation of Rule 35 which modifies the right asserted indicate that the right is "substantive" (Point C, pp. 39-44, petitioner's brief).

Conclusion: Rule 35 modifies a substantive right of the petitioner and is invalid.

This contention of the petitioner does not in itself involve the law of Illinois. But certain excluding distinctions made in petitioner's brief required a description of the Illinois law. These distinctions were made to define the scope of the question presented and to show that the petitioner was in a position to make the contention out-

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[1] *Union Pacific Railway Company* v. *Botsford*, 141 U. S. 250 (1891).

[2] *Camden & Suburban Railway Company* v. *Stetson*, 177 U. S. 172 (1900).

lined above. It was necessary to make these distinctions for the following reasons:

(a) In the *Stetson* case this Court held that the Rules of Decision Act "*in connection with the state law*"[3] may permit a federal court to order a physical examination. The opinion in that case indicated clearly that the state law applied "in connection with" the Rules of Decision Act was "the laws of the state where the United States Court sits".[4] If Illinois were one of those states whose statutes or (under the construction of the Rules of Decision Act made in *Erie R. v. Tompkins*, 304 U. S. 64) court decisions permitted an order for a physical examination, the petitioner would not be in a position to attack the validity of Rule 35. The Rules of Decision Act "in connection with" the Illinois law would permit the order entered in the instant case. And the petitioner could not assert that Rule 35 had modified her right not to be compelled to submit to a physical examination if the Rules of Decision Act had modified the right by making the state law applicable. This distinction was discussed on page 15 of petitioner's brief.

(b) Petitioner feared that, *even assuming Rule 35 to be invalid*, it might seem at first sight that the order appealed from was validated by the Rules of Decision Act "in connection with" the law of Indiana where the alleged tort occurred. To negative this possible argument, petitioner pointed out that the state whose law would be applied "in connection with" the Rules of Decision Act would be, not Indiana, but Illinois.

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[3] The phrase was used by Mr. Justice Peckham in the *Stetson* case, 177 U. S. at p. 175.

[4] 171 U. S. at p. 175.

> The reason is that the question is one governed, not by the law of the place of the injury, but by the law of the place where the action is brought—in other words, by the law of the state where the federal court sits or (to use the expression that seems to have misled respondent) the law of the forum. This point is discussed on page 17 and in Point IV (pp. 51-54) of petitioner's brief.

The frequent references to the Rules of Decision Act in petitioner's brief show clearly that Illinois law was discussed as applicable in the instant case only "in connection with" the Rules of Decision Act.

Respondent's Version of Petitioner's Contention.

At the outset of its brief respondent purports to state petitioner's contention as follows:

> "The asserted invalidity (of Rule 35) is that, there being no *Illinois* statute authorizing the Illinois courts to require a physical examination * * * and that *since the law of the State of Illinois is the law of the forum of the Federal District Court and controls that court in this matter,* the rule in question could not validly authorize the entry of such an order by a Federal District Court sitting anywhere in Illinois". (Respondent's brief, p. 2; italics supplied.)

Such a contention by petitioner would obviously be an absurdity: petitioner is represented as contending that the law of Illinois *apart from any federal statute* must be followed by federal courts in Illinois. This contention is not made in petitioner's brief. The phrase "law of the

forum'"[5] is taken by respondent from one part of petitioner's brief and elevated to the position of petitioner's sole ground for attacking the validity of Rule 35.

Throughout respondent's brief this same misunderstanding of petitioner's argument appears: see page 5 (last two paragraphs), all of pages 10 and 11, Point IV on pages 14-15.

In thus misstating petitioner's contention, respondent omits important aspects of petitioner's argument, making no mention of what is clear from petitioner's brief: the law of Illinois is pertinent in this case only "in connection with" the Rules of Decision Act and only apart from Rule 35. Respondent's statement leaves out the core of petitioner's argument (Point II, pp. 18-47, petitioner's brief) and confuses with it the excluding distinctions discussed above.

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[5] Respondent (brief, pp. 14-15) takes petitioner to task for using the term "law of the forum" to mean the law of the state where a federal court sits. Of course petitioner used "law of the forum" as state law applied under the Rules of Decision Act. Certainly federal courts have long applied some of the law of the state where they sit. In addition to the authorities cited in petitioner's brief (p. 53), see *Conn. Mut. Life Ins. Co.* v. *Union Trust Co.*, 112 U. S. 250, 256 (1884); and Leach, State Law of Evidence in the Federal Courts, 43 Harv. L. Rev. 554, 570: "On any interpretation of the section (Rules of Decision Act), *statutes of the state of the forum relative to admissibility of evidence must be followed in the federal courts in trials at common law*".

2. Arguments of Petitioner Not Answered by Respondent.

(a)

Respondent does not answer petitioner's arguments that the function of judicial rule-making power is to prescribe details of practice and of the legislative power to enact rules involving general principles and questions of public policy (petitioner's brief, pp. 23-24);

that this principle shows that there may be "procedural" matters as to which Congress may not delegate rule-making power to the courts (petitioner's brief, pp. 25-26);

that the limitation in the Rules Enabling Act should be considered in the light of this principle (petitioner's brief, pp. 26, 29);

and that, so considered, the limitation in the Rules Enabling Act was intended by Congress to forbid the modification by rule of "substantive rights" involved in "procedural" matters (petitioner's brief, p. 27).

Although the respondent asserts (see pp. 7 and 15-16, respondent's brief) that the limitation in the Rules Enabling Act was without effect and that "substantive rights" was not used in the act to include rights involved in procedural matters, respondent fails to advance any reason why petitioner's analysis of the limitation is unsound. In fact respondent does not mention petitioner's analysis.

Respondent's assertion means that the limitation is surplusage, the same position taken by Professor Sunderland and Mr. Mitchell as noted in petitioner's brief (p. 28). This interpretation, while giving a broad meaning to "procedure", gives a *narrow* meaning to "substantive rights", restricting them to rights of the character determined by the final judgment. The main authority given by respond-

ent for this narrow interpretation of "substantive rights" is a quotation from Professor Sunderland's article (respondent's brief, p. 16), part of which was quoted by petitioner (p. 28). This and other authorities cited on pp. 16-17 of respondent's brief do not detract from the result of petitioner's analysis of the Rules Enabling Act: when considered against the background of the doctrine of the separation of powers, it is clear that Congress used "substantive rights" as a term of broad meaning.

Respondent does not answer petitioner's argument (p. 29) that the *consequences* of a narrow interpretation of "substantive rights" indicate that Congress intended the term to have a broad meaning in the Rules Enabling Act.

(b)

Respondent does not answer petitioner's contention (pp. 30-33, petitioner's brief) that the emphatic language of this Court in the *Botsford* case indicates that this Court has considered the right here asserted to be "substantive". It may be, as respondent argues (pp. 12-13, respondent's brief), that the right here asserted is not proved to be substantive by the mere fact that the *Botsford* case held legislation necessary to permit violation of the right. But the opinion in the case (as that of Mr. Justice Holmes in the *Stack* case[6]) shows that the right asserted is an important right which the common law has long sought to protect. This is not denied by the respondent.

Respondent does not attempt to answer petitioner's argument (pp. 37-38, petitioner's brief) that the fact that this Court in the *Stetson* case held an order for compulsory

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[6] *Stack* v. *N. Y., etc., Railroad,* 177 Mass. 155, 58 N. E. 686 (1900).

physical examination to be governed by the Rules of Decision Act indicates that the matter is substantive.

(c)

Respondent nowhere denies that important considerations of public policy were involved in the promulgation of Rule 35 and that those considerations indicate that the rule involves substantive rights, as stated in petitioner's brief (pp. 39-44).

Respondent's only mention of this portion of petitioner's argument is to deny that Rule 35 benefits only the defending side in litigation (pp. 17-18, respondent's brief), a fact stated by petitioner to indicate one of the several considerations of policy involved in the adoption of Rule 35. Petitioner re-affirms that Rule 35 benefits only the defending side, since the rule does not contain (and it would be difficult to include in it) the administrative safeguards needed to protect plaintiffs from unskilled and biased examiners.

(d)

Respondent does not deny that Rule 35 modifies substantive rights more obviously than other rules of similar subject-matter (see petitioner's brief, pp. 44-46). There is thus no denial of the fact that orders for physical examination have been classified by high authority as a part of the law of evidence (petitioner's brief, p. 46).

(e)

Respondent does not deny petitioner's contention (petitioner's brief, pp. 48-51) that the error in the Advisory Committee's note to Rule 35 may have contributed to the construction of Rule 35 as not "substantive" which this

Court and Congress may perhaps be deemed to have made. Without mentioning this error respondent (pp. 3-4) merely relates numerous historical facts about the promulgation of the rules and their consideration by Congress,[7] much of which was stated in petitioner's brief (pp. 50-51).

3. Conclusion.

As conceded by petitioner (brief, p. 49) the careful preparation of the Federal Rules of Civil Procedure imposes a heavy burden on petitioner in urging that Rule 35 is invalid. We submit that the respondent's brief does not show that the petitioner has failed to sustain the burden and is not entitled to the relief sought in this proceeding.

Respectfully submitted,

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Attorney for Petitioner.

ROYAL W. IRWIN AND
JAMES A. VELDE,
Of Counsel.

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[7] The respondent says that the *Botsford* and *Camden* (*i. e., Stetson*) cases were "discussed at length" before the Senate, the implication being that Congress considered the same argument here urged by petitioner. Respondent's statement is not supported by the cited pages of the Congressional Record, nor by adjacent pages. The Record (Vol. 83, Part 8) reveals only that the *Botsford* case was cited once in a report of the Judiciary Committee (p. 8475) and three times in statements of witnesses before that Committee (pp. 8480, 8481), both of which were reprinted in the Record by leave, and that the holding of the *Botsford* case was stated by one witness (p. 8481) with the comment: "The reason, as is clearly shown by the opinion, is that it was a substantive right not conferred by Federal statutes". This scarcely amounts to "discussion at length".